80-975

Supreme Court, U. S.
FILED
DEC 15 1980
MICHAEL RODAK, JR., CLERK

No. 80 _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERATION FOR AMERICAN IMMIGRATION REFORM, *et al.*
Petitioners,

v.

PHILIP M. KLUTZNICK, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

GEORGE J. WEINER
SCHMELTZER, APTAKER &
SHEPPARD, P.C.
Suite 500
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-1012

Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether illegal aliens in the United States are entitled to the same degree of representation in the U.S. Congress and statewide legislative bodies and the same share of federal assistance benefits as lawful residents of the United States?

2. If illegal aliens are not so entitled, whether including in the relevant legislative apportionment and fiscal allocation bases the large and geographically concentrated class of illegal aliens deprives lawful residents in areas with small or negligible illegal alien populations of the degree of representation and share in federal assistance benefits guaranteed by statute and by U.S. Const., Art. I, §2 and Amend. 14, §§1 and 2?

3. Whether litigants representing lawful residents from all 50 states and/or litigants consisting of lawful residents in areas with small or negligible illegal alien populations have standing to complain of that dilution or deprivation of their rights?

4. Whether the Census Bureau's decision to include illegal aliens without differentiation from lawful residents in the 1980 census enumeration and all legislative apportionment and fiscal allocation bases derived therefrom is arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act and contrary to the Census Act, 13 U.S.C. §§1, *et seq.*?

5. Whether the lower courts abused their discretion in denying injunctive relief prior to the taking of the census and/or further implementation of the reapportionment and allocation process?

6. Whether 28 U.S.C. §2284(a) requires that a three-judge court hear and determine a constitutional challenge to the manner in which the base, used for nationwide reapportionment of the House of Representatives and intrastate reapportionments in more than 40 jurisdictions, is constructed?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
The Ruling That Illegal Aliens *Must* Be Included In The Nationwide Apportionment Base Is Contrary To The Premise Of Article I, §2 And Contravenes A Prior Decision Of This Court	7
The Lower Courts Redefined The Right Of Equal Representation In Denying Petitioner's Standing To Vindicate It	10
The Lower Courts Misapplied This Court's Pronouncements In Fashioning New Criteria To Meet The Redressability Branch Of Standing	13
The Lower Courts Failed To Address An Equal Protection Challenge To The Allocation Of Funds Affecting The Quality Of Life Nationwide	16
Dissolution Of The Panel Below Negates The Premise For The Recent Amendment Of The Three-Judge Court Statute	17
CONCLUSION	21
APPENDICES	1a

TABLE OF AUTHORITIES

CASES: PAGE

Burns v. *Richardson*, 384 U.S. 73 (1966) 9, 10

Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978) 13

Eiku v. *United States*, 142 U.S. 651 (1892) 9

Greater Tampa Chamber of Commerce v. *Goldschmidt*, _____ U.S. App. D.C. _____, _____ F.2d _____ (D.C. Cir. No. 79-1123, Feb. 8, 1980) 14

Mathews v. *Diaz*, 426 U.S. 67 (1976) 16

Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) 13, 14

Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 6

United States v. *Classic*, 313 U.S. 299 (1941) 8

Warth v. *Seldin*, 422 U.S. 490 (1975) 14

Young v. *Klutznick*, No. 80-71330 (E.D. Mich., Sept. 25, 1980), *appeal docketed*, No. 80-8080 (6th Cir., Nov. 6, 1980) 15

CONSTITUTION AND STATUTES:

U.S. Const. Art. I, §2 ..... i, *passim*

U.S. Const. Art. III ..... i, *passim*

U.S. Const. Amend. 14, §1 ..... i, *passim*

U.S. Const. Amend. 14, §2 ..... i, *passim*

2 U.S.C. §2a(a) 2, 12

2 U.S.C. §2a(b) 2

13 U.S.C. §1, *et seq.* i

28 U.S.C. §1253 18

28 U.S.C. §1254(1) 2

Table of Authorities Continued

CASES:	PAGE
28 U.S.C. §1331(a)	5
28 U.S.C. §1337	5
28 U.S.C. §2281 (repealed)	18
28 U.S.C. §2284(a)	ii, 5, 18
42 U.S.C. §1971(g)	18
42 U.S.C. §1973b(a)	18
42 U.S.C. §1973c	18
42 U.S.C. §1973h(c)	18
42 U.S.C. §2000a-5(b)	18
42 U.S.C. §2000e-6(b)	18
Act of March 3, 1875, 18 Stat. 477	8
Cal. Welf. & Inst. Code §11104(West)	3, 11
N.Y. Soc. Serv. Law §131-k (MicKinney 1979-80 Supp.)	3, 11
OTHER AUTHORITIES:	
H. Rep. No. 94-1379, 94th Cong., 2d Sess. (1976)	18
S. Rep. 94-204, 94th Cong., 1st Sess. (1975)	18
Staff of Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., *Report on the Use of Population Data in Federal Assistance Programs* (Comm. Print 1978)	4

No. 80 _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERATION FOR AMERICAN IMMIGRATION REFORM, *et al.*
Petitioners,

v.

PHILIP M. KLUTZNICK, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Federation for American Immigration Reform *et al.*[1] (hereinafter collectively referred to as

[1] In addition to FAIR, named parties in the proceeding below were the Committee for Representative Government and 26 individual members of the U.S. Congress, who appeared in their capacity as lawful residents, registered voters and federal and state taxpayers in jurisdictions with small populations of illegal aliens. They are: Senators Walter Huddleston (Ky.) and John Heinz (Pa.); Representatives Burgener (Cal.), Findley (Ill.), Hyde (Ill.), Derwinski (Ill.), Clinger (Pa.), Goodling (Pa.), McDade (Pa.), Bailey (Pa.), Lederer (Pa.), Dougherty (Pa.), Yatron (Pa.), Gaydos (Pa.), Atkinson (Pa.), Myers (Pa.), Walker (Pa.), Murtha (Pa.),

"FAIR") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 6, 1980.

OPINIONS BELOW

The judgment of the Court of Appeals, not reported, appears in Appendix ("App.") A hereto. The Court of Appeals rendered no opinion in affirming the order and opinion of the district court, which was reported as 486 F. Supp. 564 (D.D.C. 1980) and is set out at App. B hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 6, 1980, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Murphy (Pa.), Marks (Pa.), Coughlin (Pa.), Ritter (Pa.), Shuster (Pa.), Schultze (Pa.), Walgren (Pa.) and Jeffords (Vt.).

In addition to Philip M. Klutznick, Secretary of the U.S. Commerce Department, named appellees in the proceeding below were Vincent P. Barabba, Director, Bureau of the Census; Hons. James Earl Carter and Edmond Henshaw, Jr. (President of the United States and Clerk of the U.S. House of Representatives, respectively, who are required by statute, 2 U.S.C. §§2a(a), (b), to transmit to Congress and the states the statement, prepared by the Census Bureau, showing the population of each state derived from the 1980 census and resulting reapportionment of Representatives to Congress); the U.S. Department of Commerce and the Bureau of the Census (collectively referred to herein as the "Census Bureau"). Intervenors in support of appellees below were the State and City of New York and the Hon. Edward I. Koch, Mayor of the City of New York, who appeared in his capacity as a citizen of the United States and the City and State of New York and a registered voter and taxpayer therein (collectively referred to herein as "New York"). The Mexican-American Legal Defense and Educational Fund appeared as *amicus curiae* in support of appellees below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional and statutory provisions are set out in App. C hereto and cited below:

U.S. Const., Art. I, §2, cl. 1; cl. 3 Amend. 14, §1; §2

28 U.S.C. §2284(a)

Cal. Welf. & Inst. Code §11104 (West)

N.Y. Soc. Serv. Law §131-k (McKinney 1979-80 Supp.)

STATEMENT OF THE CASE

Upon deciding that illegal aliens[2] in this country were "residents" of the United States to be included in the 1980 decennial enumeration, the Census Bureau took unprecedented steps to maximize their inclusion in the census. The Bureau instituted a nationwide media campaign to promote responses by illegal aliens to the census. To that same end it enlisted the aid of community leaders and local organizations as well as other federal agencies, the Attorney General, for example, issuing to the Immigration and Naturalization Service a directive that it cease certain of its enforcement activities in order to encourage census responses from illegal aliens.[3]

---

[2] The term "illegal alien" is used herein to denote non-citizens who may be considered "residents" for purposes of census enumeration but have no legal right to remain, work or reside in the U.S. absent a change in their legal status under the immigration laws. This includes those foreign nationals who entered this country in violation of the statutes governing entry or immigration to the U.S. and those who were admitted lawfully but thereafter remained in violation of the terms of their admission.

[3] *See* Memorandum of November 26, 1979 from Benjamin R. Civiletti, U.S. Attorney General, to David Crossland, Acting Commissioner, U.S. Immigration and Naturalization Service.

At the same time, however, the Census Bureau devised its collection and tabulation procedures to leave no means to determine the number of illegal aliens included in every data base derived from the 1980 census.

The significance of that omission is two-fold. First, the census serves not only as the base for the decennial reapportionment of the U.S. House of Representatives and Presidential Electors, but also constitutes the local reapportionment base for representatives to Congress and state legislatures in more than 40 jurisdictions and serves as the prime determinant in allocating to local programs more than $50 billion annually in federal assistance funds.[4] Second, evidence presented in the proceeding below by both the Census Bureau and FAIR[5] included assessment of all the principal studies of illegal alien demographics conducted during the last decade. These data show without dispute that by 1978 there were at minimum between 3.5 and 6.0 million illegal aliens in the United States, with a continuing growth of this population since that time, and that the illegal alien population is highly concentrated (more than 80 percent) in fewer than ten states and further concentrated within the urban areas of those states.

---

[4] These funds are distributed under more than 100 federal programs, which are detailed in B. Maffei, Staff of Subcomm. on Census and Population of House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., *Report on the Use of Population Data in Federal Assistance Programs* (Comm. Print 1978).

[5] Affidavit of V. Lance Tarrance, ¶¶10-14, accompanying FAIR's Dec. 20, 1979 Statement of Points and Authorities in Support of Application for Preliminary Injunction; U.S. Bureau of the Census, Preliminary Review of Existing Studies of the Number of Illegal Residents in the U.S., Ex. 8 to Census Bureau's Jan. 31, 1980 Reply Memorandum and Opposition to Plaintiffs' Motion for Summary Judgment.

FAIR on December 5, 1979 filed a complaint for injunctive and declaratory relief, invoking the district court's jurisdiction under 28 U.S.C. §§1331(a) (general federal question jurisdiction) and 1337 (actions arising under Acts of Congress regulating commerce). FAIR sought a declaratory judgment that the Census Bureau's decision to include in the 1980 census (and all legislative and fiscal apportionment bases derived therefrom) this large and geographically concentrated class unentitled to political representation or social assistance benefits in this country would result in an unconstitutional malapportionment of the national and state legislatures and a misallocation of assistance benefits contrary to the Constitution and to statute. FAIR also sought injunctive relief restraining conduct of the 1980 census and/or implementation of the reapportionment and allocation process absent exclusion of illegal aliens from the relevant data bases. On FAIR's motion pursuant to 28 U.S.C. §2284(a), a three-judge court was convened.

On February 7, 1980, the three-judge court heard argument on FAIR's motion for preliminary injunction and cross-motion for summary judgment and motions to dismiss or, in the alternative, for summary judgment on the part of the Census Bureau and New York. On February 26, 1980, the court issued its order and opinion, finding that all the various Petitioners lacked standing with respect to their claims of congressional and intrastate malapportionment, discriminatory administration ofthe census-based assistance programs and claims under the Administrative Procedure Act.

The court then proceeded to assess, in terms adverse to FAIR, the equities bearing on its request for injunctive relief and the merits of its underlying constitutional claims. App. at 25a-29a. Further finding "that the issue

is most likely one for a single district judge" [*id.* at 29a] and noting concurrence in the panel's opinion by the single district court judge to whom the action was first assigned, it adopted the procedure previously employed in *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114, n.4 (1965), in dissolving the three-judge court. App. at 30a. The three-judge court thereupon entered an order denying FAIR's motions for a preliminary injunction and summary judgment, granting Respondents' motions to dismiss and for summary judgment, and dismissing the action.

FAIR on February 27, 1980 filed notices of appeal both to this Court and the Court of Appeals for the District of Columbia Circuit, where proceedings were deferred pending this Court's ruling on the question of its jurisdiction. FAIR on March 4, 1980 applied to the Chief Justice of this Court, as Circuit Justice, for an injunction pending appeal. That application was referred to the full Court, which on March 17, 1980 denied the application and on June 16, 1980 entered an order dismissing the appeal for lack of jurisdiction. Proceedings were then continued in the Court of Appeals which heard, on an expedited basis, oral argument on October 10, 1980. On November 6, 1980, the Court of Appeals entered a *per curiam* judgment. *See* App. at la. Finding that "the issues presented occasion no need for an opinion" and noting its "substantial agreement with the reasons and conclusions expressed in the opinion of the District Court" [*id.*], the Court of Appeals ruled that the lower court's order be affirmed.

REASONS FOR GRANTING THE WRIT

Through its determination of nationwide Congressional reapportionment, the reapportionment of Con-

gressional districts and state legislatures in 40 states and the allocation of $50 billion annually in federal assistance funds, there now rests with the Census Bureau the direction of those forces that shape the political and social contours of this nation for a decade at a time. The Census Bureau's unprecedented decision to maximize the inclusion of illegal aliens in the 1980 census calls directly into question the constitutional legitimacy of the direction it has imparted to those forces. That question will recur in redrawing all 435 Congressional districts and state legislatures in a multiplicity of jurisdictions as well as in the next decade's administration of more than 100 "census-based" federal assistance programs.

The lower courts' refusal to confront these questions of nationwide importance proceeded from their redefinition of two constitutional concepts—the "one person, one vote" principle and the law of standing—central among those extensively developed by this Court in recent years. They did so in a context, never addressed by this or any other Court, novel in its nationwide application and critical in its implications both for the political process and the coming decade's distribution of hundreds of billions in federal assistance funds. This case also raises the vexing jurisdictional questions that have long surrounded three-judge court practice and that appear to defy Congress' recent attempt at their resolution. We amplify these points below.

The Ruling That Illegal Aliens *Must* Be Included In The Nationwide Apportionment Base Is Contrary To The Premise Of Article I, §2 And Contravenes A Prior Decision Of This Court.

While the evidence showed that reallocation of as many as 16 Congressional seats turned on the inclusion

of illegal aliens in the nationwide apportionment base,[6] the lower courts found that result unobjectionable as a constitutional matter. The census was designed by the Framers only to effectuate the "Great Compromise" in Article 1, §2 that representatives to one house of the national legislature be chosen directly by "the People of the several States." No effort was made below to determine who properly may be included among those "People" secured equal representation by Article I, §2. Instead, the lower courts relied on the literal reference in Amend. 14, §2 to a census enumeration of the "whole number of persons in each State," and found that illegal aliens are "persons" fitting the "all-inclusive" language chosen by the Framers. *See* app. at 26a.[7]

The lower courts' limited conception of the question contravenes the principle that the Constitution is a broad framework of government which cannot be read with such literalism but must instead be interpreted to fulfill its underlying premises, particularly in a context with which the Framers were unfamiliar. *See, e.g., United States* v. *Classic*, 313 U.S. 299, 315-16 (1941). That is the case here because no alien was "illegally" in this country until enactment of the first immigration statute in 1875. Act of March 3, 1875, 18 Stat. 477.

Consider further the underlying premise of Article I, §2: formation of a compact by which the people of this

---

[6] *See* Affidavit of V. Lance Tarrance, *supra* n.5, at ¶¶21-22.

[7] This reasoning founders initially on the Census Bureau's concession that it has never counted all "persons" in a state on census day, only those considered "residents" under a set of guidelines that exclude from the census a foreign citizen lawfully in this country on a tourist visa, for example, but include that same foreign national when he violates that visa to "reside" in this country unlawfully.

nation agreed they would govern themselves. A foreign national, at home in his country of citizenship, has no right to an equal voice in *this* nation's government, and his success at crossing our borders illegally and eluding deportation long enough to complete a census questionnaire cannot confer that right on him.

To conclude otherwise not only undermines the immigration laws and the social policies they represent, but also negates the fundamental authority from which those laws derive: the sovereign power of the people of a nation to set the terms by which the people of other nations may join their body politic. *Eiku* v. *United States*, 142 U.S. 651, 659 (1892).

In effectively ruling that all "persons," including illegal aliens, "in" the U.S. on census day must as a constitutional matter be reflected equally in the nationwide reapportionment base, the lower courts also negated the thrust of this Court's decision in *Burns* v. *Richardson*, 384 U.S. 73 (1966). The dispute there centered on Hawaii's use of an apportionment base consisting of registered voters, rather than a base of state citizens or the "total population" of Hawaii, which, as determined by the federal decennial census, included a large and disproportionately distributed number of transient military personnel and civilian visitors. This Court approved the use of the registered voter base in that circumstance, and in so doing pointed out that none of its reapportionment cases had even "suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." 384 U.S. at 92 (footnote omitted).

The Court went on to state, however, that the Constitution does not admit of unbridled discretion in arriving at the consist of the legislative apportionment base. "The decision to *include or exclude any* such group involves choices about the nature of representation with which," in the context of Hawaii's exclusionary choice, the Court saw "no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, . . . the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby." *Id.* (citation omitted) (emphasis added).

Similarly faced with a large and geographically concentrated class of those unentitled to representation, the lower courts were here unable to perceive any constitutionally founded reason to interfere with the Census Bureau's all-inclusive choice about the nature of representation nationwide. Their talismanic reliance on the term "persons in" would impose upon the federal and state governments an absolute constitutional requirement for a "total population" base, regardless how far that will skew the principle of equal representation for "the People of the several States." As such, the lower courts' decision places an inflexible hold upon any effort to fulfill the premise of the reapportionment cases, and is by its terms wholly incompatible with this Court's rationale in *Burns* v. *Richardson*.

The Lower Courts Redefined The Right Of Equal Representation In Denying Petitioners Standing To Vindicate It.

For purposes of standing, the lower courts assumed that illegal aliens must be excluded from the nationwide apportionment base, but nonetheless denied Petitioners

standing to complain of their inclusion by the Census Bureau. Their reason was that, despite FAIR's showing the "inevitability" of at least one state, California, gaining an additional seat solely because of its illegal alien population, Petitioners could only speculate whether they were residents of the state that would gain this seat if illegal aliens are excluded. *See* App. at 14a.

Initially, that analysis is factually insupportable. As the Census Bureau conceded on brief in the Court of Appeals, FAIR's organizational membership includes lawful residents in all 50 states. Given the district court's acknowledgment that at least one state would, because of its illegal alien population, gain a seat to which it would not otherwise be entitled, the fixed size of the House compels the conclusion that California's gain would be at the expense of one of the other 49 states wherein one of FAIR's members admittedly resides. Thus, by the court's own analysis, FAIR had established its standing.

More importantly, however, this analysis of standing redefines the right secured by Article I, §2 in creating a requirement that standing to contest legislative malapportionment is contingent not on showing relative inequality of representation but upon proof that the inequality is solely at the expense of the area in which a particular litigant resides. Not only is this test unheard of, it is also irreconcilable with the core principle of the reapportionment cases: that the Constitution guarantees every proper constitutent, regardless of place of residence, an equal voice in the affairs of government. Thus, the injury to Petitioners has nothing to do with shifting Representatives among the states and instead results from the disproportionately greater representative voice the Census Bureau will afford lawful residents of areas where the illegal alien population is concentrated.

To put the matter in a graphic perspective, the country's population (approximately 220 million) and the fixed size of the House (435 seats) will produce Congressional districts of approximately 500,000 "persons" each. When one Congressional Representative is apportioned to each half million people in a base that includes the large and geographically concentrated illegal alien population, 400,000 lawful residents of a state like California will have the same representation as 500,000 lawful residents of a state like Kentucky.

Of course, if upon excluding illegal aliens California loses a seat to a state other than Kentucky, there would still be 500,000 Kentuckians to that Representative. However, there would then *also* be 500,000 Californians to a Representative, and California's loss of that seat to some other state is only the product of the current apportionment formula, designed expressly to maximize equality of representation nationwide.[8] That is the result Petitioners seek to accomplish: equal representation for equal numbers of "the People of the several States" on a nationwide basis.

The lower courts' analysis thus constitutes an unacceptable departure from the obvious and accepted meaning of the right of equal representation, and will deny standing not only to FAIR but numerous other litigants who will seek to contest the outcome of the nationwide reapportionments that take place after each census. And,

---

[8] The formula currently prescribed by statute, 2 U.S.C. §2a(a), is known as the "method of equal proportions." Of several formulas employed over the years, this method is proven best to minimize relative differences in the number of persons per Representative for any given pair of states, and is thus rooted in the concept of maximizing equality of representation at the national level.

if the lower courts' conception is accurate, a group of litigants representing all 50 states must have standing if *any* litigant is ever to have redress of a nationwide malapportionment of Congress

The Lower Courts Misapplied This Court's Pronouncements In Fashioning New Criteria To Meet The Redressability Branch Of Standing.

Relying on *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978), the lower courts also found that Petitioners lacked standing because the "failed to demonstrate that the relief they seek will redress the injury they assert." App. at 21a. That view was premised on the assessment that one of but several remedies suggested by FAIR would not "permit such a calculation [of the number of illegal aliens] with any reasonable degree of accuracy." *Id.* This overlooks entirely the fact that effective relief required not a separate census of illegal aliens but only their exclusion from the census-derived apportionment base, as suggested by several alternative remedies advanced by FAIR both to the district court and the Court of Appeals.

Nor is the lower courts' approach to standing consistent with this Court's decision in *Duke Power Co.*, where the inquiry was whether there existed a "but for" causal connection between the actions complained of and the harm alleged. *See* 438 U.S. at 74—75. The appropriate inquiry on standing, therefore, is not the feasibility of a particular remedy or the best means to fashion other relief, but whether the injury to result absent *some* remedy "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Kentucky Welfare Rights*

Org., 426 U.S. 26, 41—42 (1976). The requisite causal connection between the Bureau's conduct of the census/reapportionment process and dilution of Petitioners' right of equal representation is here unquestionably present.

A corollary to the underlying "but for" requirement finds expression in cases where, *despite fully effecting the relief sought*, extraneous factors, beyond the scope of relief as impelemented, preclude redress of the injury.[9] This corollary can, however, find no application here—if illegal aliens are excluded from the apportionment base, the inequality of which FAIR complains will be eliminated. The lower courts thus removed the "but for" requirement of *Duke Power Co.* a step backward to deny standing because of an asserted difficulty in implementing relief that, by its terms, would be effective.

Neither Article III nor *Duke Power Co.* can sanction disspelling a "case or controversy" because of an asserted difficulty in fashioning relief. Such a test would in every case in federal court convert the threshold determination of standing into a trial on the merits of the remedy suggested by the plaintiff. That approach is both

---

[9] *See, e.g., Warth* v. *Seldin*, 422 U.S. 490 (1975) (even if exclusionary zoning was precluded, low-income plaintiffs seeking access to housing could secure it only if builders would construct inexpensive housing in affected areas); *Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, (voiding Secretary's tax exemption for nonprofit hospitals that denied services to indigents would not lead to provision of services since hospitals could forego exemption to avoid financial drain of increase in level of uncompensated services); *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, _____ U.S. App. D.C. _____, _____ F.2d _____ (D.C. Cir. No. 79-1123, Feb. 8, 1980) (voiding Executive Order on air transportation agreement with Great Britain would not provide greater level of service to plaintiffs since government of Great Britain could deny landing rights to carriers undertaking to provide such service).

wholly unworkable in the abstract and erroneous in its application here to the "sufficiency" of the remedies advanced by FAIR.[10]

The lower courts thus grafted onto the redressability brand of standing—with implications for the variety of cases in which the federal courts are called upon to fashion "difficult" remedies—a constitutional requirement that the existence of a justiciable case or controversy turns upon the efficacy of a court implementing not the relief it deems appropriate but a remedy disputed by

---

[10] With respect to the accuracy of the data required to effect relief, we would refer the Court to the recent decision in *Young* v. *Klutznick*, No. 80-71330 (E.D. Mich., Sept. 25, 1980), *appeal docketed*, No. 80-8080 (6th Cir. Nov. 6, 1980), in which the mayor of Detroit brought suit claiming that a substantial undercount of the city's population deprived its residents of equal representation. The constitutional concept upon which Mayor Young based his standing was similar to that here advanced: an undercount in areas where the plaintiffs reside (or an "overcount" in areas where they do not) results in Congressional representation disproportionate to the relative number of constituents. Sufficiency of remedy also was vigorously contested in *Young*, but at no point was it even suggested to have any relevance to standing. Moreover, the court there rejected the Census Bureau's contention that any inaccuracies inhering in the nationwide adjustments for undercount it mandated would render the census something other than the "headcount" the Bureau insisted it historically had been. Noting the substantial undercount in the 1970 census (10.2 million) and the fact that 4.9 million of those reported in the "headcount" were simply imputed by Bureau adjustment techniques, the court concluded [*id.*, slip op. at 18]:

> It is therefore clear that the [Census Bureau's] contention that the Constitution mandates that the decennial census be nothing but a simple, straightforward headcount rings hollow. Their contention that the adjustments in 1970 were somehow different, because the Bureau had some indication as to where to place the imputed persons, simply is not persuasive. In fact, such an assertion is astonishing in light of the "sampling" techniques utilized to impute persons and housing units that the Bureau estimated existed.

the parties before it. That approach is both incompatible with its purported source in *Duke Power Co.* and inconsistent with the responsibility of the federal judiciary to resolve properly justiciable disputes.

The Lower Courts Failed To Address An Equal Protection Challenge To The Allocation Of Funds Affecting The Quality Of Life Nationwide.

Absent appropriate adjustment of census data, the 1980 enumeration also will skew allocations pursuant to the more than 100 "census-based" federal assistance programs created in the decade since the last census. More than $50 billion was appropriated for these programs in the last fiscal year, and these funds have a vital impact upon the ability of state and local governments to further essential efforts at community development, elementary, secondary and vocational education, job training, delivery of health services, environmental protection and conservation, development of transportation systems and social assistance to the needy.

The lower courts chose not to entertain what was characterized as a "blunderbuss attack" on all 100 programs, but FAIR's complaint in this respect turns on a single legal question: whether illegal aliens are entitled to the same "fair share" in these benefits as lawful residents. None of these programs specifies the statutory eligibility of illegal aliens, who are among the classes that this Court in *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976), cited as unable to "advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests."

The misallocations to result from this census are plainest in the case of states like New York and Califor-

nia which by statute[11] preclude their illegal alien populations (the most sizeable in the nation) from any state assistance benefits funded in large part by these federal programs. When New York City receives what it allowed in the proceeding below to be millions of dollars each year in these funds because of its illegal alien population, then denies that population any access to those benefits, the lawful residents of that city reap an obvious and substantial windfall at the expense of those, like Petitioners, who live in areas with small illegal alien populations.

FAIR's specific references to these multibillion dollar misallocations find no mention whatever in the lower court's footnote dispensation of this question. It remains one with an impact nationwide and decade-long, and presents a pattern of discrimination that cannot be justified in either compelling or rational terms under the equal protection clause.

Dissolution Of The Panel Below Negates The Premise For The Recent Amendment Of The Three-Judge Court Statute.

In response to the growing demand placed upon the federal judiciary and this Court's appellate docket by an enactment that had largely outlived its intended purpose, Congress in 1976 revised the three-judge court statute with the stated aim of reducing the class of cases required to be heard by three-judge courts and eliminating the procedural complexities growing out of the construction placed upon the appellate and jurisdictional provi-

---

[11] *See* N.Y. Soc. Serv. Law §131-k (McKinney 1979-80 Supp.); Cal. Welf. & Inst. Code §11104 (West). These are set out in App. C hereto, App. at 33a.

sions of 28 U.S.C. §§1253 and 2281.[12] Section 2281 was therefore repealed in its entirety and replaced by 28 U.S.C. §2284(a), requiring a three-judge court only "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Apart from the small number of statutes expressly calling for three-judge courts,[13] Congress maintained only this one non-statutory class of cases for resolution by such panels in view of the fundamental constitutional questions posed by any case "involving" legislative reapportionment.[14]

---

[12] *See generally* S. Rep. No. 94-204, 94th Cong., 1st Sess., at 6-7 (1975) (hereinafter cited as "S. Rep. No. 94-204"), printed at 1976 U.S. Code Cong. & Admin. News 1993-94.

[13] Three-judge courts are required in actions under Sections 4(a), 5(a) and 10 of the Voting Rights Act of 1965, 42 U.S.C. §1973b(a), 1973c and 1973h(c). Such courts may be convened in actions under the voting provisions of the Civil Rights Act of 1964, 42 U.S.C. §1971(g), and may be convened upon the request of the Attorney General under the public accomodations and equal employment provisions of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-5(b), 2000e-6(b). *See generally* S. Rep. No. 94-204, *supra* n.12,at 9.

[14] *See, e.g.*, S. Rep. No. 94-204, *supra*, at 1 ("However, three-judge courts would be retained when specifically required by act of Congress or in any case involving congressional reapportionment or the reapportionment of any statewide legislative body."), 9 ("The bill preserves three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because it is the judgment of the committee that these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases."); H. Rep. No. 94-1379, 94th Cong., 2d Sess., at 3 (1976) ("The amendments to section 2284 will insure that three-judge courts would be retained when specifically required by an act of Congress or in any case involving congressional reapportionment or the reapportionment of any state-wide legislative body.").

The lower courts placed upon §2284(a) the limitation that three-judge panels be convened only in cases challenging the constitutionality of state statutes bearing on the apportionment of legislative districts already drawn. App. at 29a—30a. However, reapportionment is a process, and its first and most fundamental step is construction of the numerical base from which legislative representation is distributed. Unless the base is properly structured in the first instance, any later effort to draw district lines from that base cannot possibly comply with constitutional criteria.

Nothing in the legislative history of the 1976 amendment indicates that Congress intended the limitations imposed by the lower courts,[15] and it is anomalous to suggest that, because of their constitutional significance, Congress intended that three-judge courts preside over disputes concerning specific district lines but that a single judge hear a challenge, such as presented here, to that step in the apportionment process indispensable to the constitutional integrity of all election district boundaries. This question is of continuing significance to Petitioners, as it determines the court to which a remand for implementation of relief may be made. It is also of general

---

[15] The panel below premised its dissolution of the three-judge court on the observation that the drafters of §2284(a) did not "appear to have intended to cover cases such as this which do not directly affect state reapportionment," citing a passage from a Senate report stating that the revision of §2284(a) was "intended to apply to actions 'challenging the constitutionality of any *statute* apportioning congressional districts.'" App. at 29a-30a. The Senate report cited, however, accompanied a bill that was considered but never acted upon by the 93d Congress. We have found no similar reference in the legislative history of the bill enacted by the 94th Congress, which enactment by its terms plainly makes no limiting reference to cases involving state apportionment statutes.

significance because this is the first apportionment case to be brought under the amended three-judge court statute, within which Congress maintained cases such as this one with a view to the reapportionment litigation that would surround the 1980 census.[16] The interpretation placed on §2284(a) in this proceeding thus serves as the sole precedent upon its application, one which negates Congress' intention to give any case involving the significant constitutional questions surrounding reapportionment expanded initial consideration and expedited review in this Court.

---

[16] In hearings before the 93rd Congress (referred to by the lower court) on predecessor bills to that ultimately enacting §2284(a), Robert G. Dixon, then Assistant Attorney General for the Office of Legal Counsel, testified on the Justice Department's overall support for the proposed revision of §2284 and added:

> [a] special word . . . concerning the provision of S. 271 which would retain the three-judge court requirement in reapportionment cases. This is an esoteric area well-known to only a few, but in all candor I must say that it has been one of my specialties and I have some considered views on it. One area where three-judge district courts have a high claim to be retained, *at least through the 1980 census litigation*, is the reapportionment area. This is so because the structure of the key state policy-making body is at stake—the legislature—and the record of the district courts in this area has been unsettling.

Hearings before the Subcomm. on Courts, Civil Liberties & Admin. of Justice of the House Comm. on the Judiciary on S. 271 and H.R. 8285, 93rd Cong., 2d Sess., at 91 (1974) (emphasis added). Mr. Dixon further explained the Department's view that, "at least for the time being In the United States up through the 1980 census, which is our next big bulge in reapportionment cases . . . the three-judge district court requirement would be beneficial." *Id.* at 87.

CONCLUSION

For the above-stated reasons, Petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE J. WEINER
SCHMELTZER, APTAKER
& SHEPPARD, P.C.
Suite 500
1800 Massachusetts
Avenue, N.W.
Washington, D.C.
20036
(202) 828-1012

Counsel for Petitioners

December, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SEPTEMBER TERM, 1980

No. 80-1246

FEDERATION FOR AMERICAN IMMIGRATION REFORM, *et. al., Appellants*

v.

PHILIP M. KLUTZNICK, *et al.*

STATE OF NEW YORK, *et al., Intervenors*

Civil Action No. 79-3269

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed November 6, 1980

GEORGE A. FISHER
Clerk

Before TAMM and ROBINSON, *Circuit Judges,* and HARLINGTON WOOD*, *Circuit Judge,* United States Court of Appeals for the Seventh Circuit.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JUDGMENT

This cause came on the be heard on the record on appeal from the United States District Court for the District of Columbia and briefs were filed herein by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, this Court being in substantial agreement with the reasons and conclusions expressed in the opinion of the District court, it is ORDERED and ADJUDGED by this court that the order of the District Court appealsed from in this cause is hereby affirmed.

Per Curiam
For the Court

GEORGE A. FISHER
Clerk

---

* Sitting by designation pursuant to 28 U.S.C. §291(a) (1976).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3269

FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR) ET AL.,

Plaintiffs,

v.

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE, ET AL.,

Defendants.

ORDER

Filed February 26, 1980

Upon consideration of the motions before the Court, the memoranda submitted in support thereof and in opposition thereto, the argument of counsel in open Court, and the entire record herein, and for the reasons set forth in the accompanying Opinion of this same date, it is by the Court this 26th day of February, 1980,

ORDERED that plaintiffs' motion for preliminary injunction be, and hereby is, denied; and it is further

ORDERED that plaintiffs' motion for summary judgment be, and hereby is, denied, and it is further

ORDERED that plaintiffs' motion for joinder of parties and for leave to file amendments to their complaint be, and hereby is, granted; and it is further

ORDERED that Representatives William S. Clinger, Jr., William F. Goodling, Joseph M. McDade, Don Bailey, Raymond F. Lederer, Charles F. Dougherty, Gus Yatron, Joseph M. Gaydos, Eugene V. Atkinson, Michael Myers, Robert S. Walker, John P. Murtha, Austin Murphy, Marc Lincoln Marks, R. Lawrence Coughlin, Don Ritter, Bud

Shuster, Richard T. Schultze, Doug Walgren, and James M. Jeffords, Senator John Heinz, and the Committee for Representative Government be, and hereby are, joined as plaintiffs in this action; and it is further

ORDERED that the Clerk of the Court be, and hereby is, directed to file plaintiffs' amended complaint, the attachment to plaintiffs' motion for joinder of parties and leave to file amendments to complaint that is entitled "Amended Complaint for Injunctive and Declaratory Relief"; and it is further

ORDERED that defendants' motion to dismiss or, in the alternative, for summary judgment be, and hereby is, granted; and it is further

ORDERED that the motion of the State, City, and Mayor of New York to intervene as defendants be, and hereby is, granted; and it is further

ORDERED that summary judgment be, and hereby is, entered for defendants and intervenor-defendants; and it is further

ORDERED that the action be, and hereby is, dismissed; and it is further

ORDERED that the three-judge court convened pursuant to 28 U.S.C. § 2284 (1976) be, and hereby is, dissolved.

/s/ PATRICIA M. WALD
Patricia M. Wald
United States Circuit Judge

/s/ OLIVER GASCH
Oliver Gasch
United States District Judge

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3269

FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR) ET AL.,

Plaintiffs,

v.

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE, ET AL.,

Defendants.

OPINION

Filed February 26, 1980

This court is convened as a three-judge court to consider the constitutionality of the 1980 census, due to be conducted within a few weeks, insofar as it will fail to establish the number of illegal aliens in the country, or the states and districts within which they live. The failure to undertake this effort, plaintiffs [1] allege, will result in the inclusion of a large but presently unascertainable number of illegal aliens in the population figures which form the basis for the apportionment of United States Representatives among the states, the apportionment by many states of their congressional and state officials among districts, and the distribution of federal funds for a variety of programs. The exclusion of illegal aliens from the apportionment population base is mandated, they contend, by the

[1] The plaintiffs joined in the Amended Complaint include the Federation for American Immigration Reform [FAIR] and the Committee for Representative Government on their own behalf and as representatives of their members, Representatives from Kentucky, California, Illinois, Vermont and Pennsylvania and a Pennsylvania Senator.

Constitution, which assertedly contemplates that only lawful residents should be included in the population figures from which apportionment is made. Since current estimates indicate that the bulk of illegal aliens live in a relatively few states, and further within a relatively few cities within those states, undifferentiated inclusion of illegal aliens in the general population figures will result in disproportionate allocations to those states and regions of both congressional Representatives and federal funds distributed on the basis of population. Thus, the plaintiffs allege, the votes of persons in some states or regions will be diluted in comparison to those in the states and regions with a large illegal alien population, and those same persons may, as residents of the disadvantaged states or regions, also receive a lesser share of federal monies.

We conclude that we lack jurisdiction to decide the merits of the case because the plaintiffs lack standing to raise the issue, and we therefore grant summary judgment to the defendants.[2]

I. The Census and the Constitution: The Positions of the Parties

The 1980 decennial census, scheduled to commence April 1, 1980, will be the twentieth effort to enumerate the population of the United States, pursuant to constitutional and statutory command, for the principal purpose of determining the number of Representatives which each state is entitled to send to the United States House of Representatives. Article I, section 2, clause 3, of the Constitution provides:

> Representatives . . . shall be apportioned among the several States which may be included within this

---

[2] The defendants are the Secretary of Commerce, the Director of the Bureau of the Census, the President of the United States, and the Clerk of the House of Representatives.

> Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

With the abolition of slavery, the formula for apportionment was revised. The fourteenth amendment modified the first sentence of article I, section 2, clause 3, to provide:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

The most recent Census Act, 13 U.S.C. §§ 1, *et seq.*, adopted in 1976, charges the Secretary of Commerce with the responsibility of conducting the census, calculating the number of Representatives to which each state is entitled, and transmitting those figures to the President, who then, pursuant to the mandate of 2 U.S.C. § 2(a), delivers them to the Clerk of the House of Representatives, who officially notifies each state of the size of its delegation. The allocation of Representatives is accomplished pursuant to a formula known as the "method of equal proportions," which, it has been determined by Congress, results in an allocation of Representatives most nearly proportional to the actual population figures of the several states. *Id.*

The census figures are also used for a variety of other purposes. Most relevant to this lawsuit is the fact that many states use the figures as the basis for their own internal apportionment of state and local governmental bodies, and Congress requires the use of the figures as a

basis for distribution of federal funds under a number of financial assistance statutes.[3]

The population base used for apportionment purposes consists of a straightforward head count, as accurate as is reasonably possible, of all persons residing within a state on April 1.[4] This has been the practice since the first census in 1790; everyone is counted except foreign diplomatic personnel living on embassy grounds (which is con-

---

[3] According to a 1978 report, some 107 federal programs use census data or population figures developed from census data as a factor in allocating federal funds. B. Maffei, Staff of House Subcommittee on Census and Population of the Committee on Post Office and Civil Service, 95th Cong., 2d Sess., *Report on the Use of Population Data in Federal Assistance Programs* 11 (Comm. Print 1978). *See, e.g.*, State and Local Fiscal Assistance Act, 31 U.S.C. § 1221, *et seq.*; Comprehensive Employment and Training Act, 29 U.S.C. § 801, *et seq.*; Social Security Act, 42 U.S.C. § 301, *et seq.*; Community Development Act of 1974, 42 U.S.C. § 5301.

[4] The Census is conducted largely by mail, using two questionnaires. The "short form" asks seven questions about each person living in a particular residence; name, sex, birth date, marital status, relation to the person in whose name the dwelling is owned or rented, race, and whether the person is Hispanic. There are also a number of questions about the dwelling itself. There are *no* questions concerning citizenship. This form is sent to 80 percent of American households.

The remaining 20 percent will receive "long-form" questionnaires, containing dozens of additional questions. The long form does ask the country of birth and whether any household members born outside the United States are citizens. No questions are on either form from which an alien's legal status could be directly determined.

If a census form is not returned by mail, a census taker will personally contact the household. There will also be a "Mission Night" and a three-week "casual count," during which census personnel will attempt to gather data on individuals with no regular home. See, for further explanations of how the census is conducted, Hacker, *The No-Account Census,* Harper's March, 1980, at 28; Affidavit of V. Lance Tarrance, ¶¶ 5-9; Affidavit of Daniel B. Levine, ¶¶ 6-7.

sidered "foreign soil," and thus not within any state) and foreign tourists, who do not "reside" here. The Census Bureau intends to make no effort to count separately the number of illegal aliens currently resident in the country, though it has undertaken a substantial effort to minimize undercounting of the minority groups which are likely to include illegal aliens.[5]

According to the plaintiffs, the number of illegal aliens within our boundaries has skyrocketed in the last decade. While no accurate data is available, most present estimates of their numbers range between three and eight million.[6] This is a large enough population that, plaintiffs allege,

---

[5] The Bureau has devoted a great deal of time and effort to developing means to more accurately count the "hidden" population which has been missed in prior censuses. It has developed a bilingual questionnaire and undertaken a substantial public relations campaign designed to encourage response to the questionnaire and assure the population of the confidentiality of all answers. Special efforts have been made to hire censustakers familiar with ethnic neighborhoods and able to speak the language of the people they will be contacting. It remains to be seen, of course, whether any or all of these efforts will bear fruit. For an analysis of the Census Bureau of the extent of the undercount problem, see "Estimates of Coverage of Population by Sex, Race and Age: Demographic Analysis," 1970 Census Evaluation and Research Program, Publication No PHC(E)-4 (1974). See also U.S. Comm. on Civil Rights, *Counting The Forgotten* (1974).

[6] No estimate of the size of the illegal alien population exists which is accepted as accurate or based on hard data. In a recent report, the Census Bureau reviewed the results of a number of different studies, identified the statistical shortcomings of each, and offered its own opinion that the illegal alien population is "almost certainly below 6.0 million, and may be substantially less, possibly only 3.5 to 5.0 million." *Preliminary Review of Existing Studies of The Number of Illegal Residents in the United States* 19 (1980). FAIR's Executive Director described these low estimates as "practically snatched out of the air," Washington Post, Jan. 31, 1980, at p. A15, and the plaintiffs contend here that the minimum possible illegal alien population is 5 million.

including illegal aliens in the apportionment base could cause a shift between states of between one and sixteen congressional seats, depending on concentrations in particular states and cities.

The constitutional core of plaintiffs' argument is that the phrase, "the whole number of persons," does not, in historical context, include illegal aliens, though they agree that the concept includes all *lawful* residents, citizen and alien alike. Their argument proceeds along the following lines. The concept of illegal aliens was unkown to the Framers; there *were* no illegal aliens for nearly a century thereafter when the first act excluding certain aliens (prostitutes and convicts) was passed. Act of March 3, 1875, 18 Stat. 477. Arguing that an intent to grant representation to persons unlawfully within the country therefore cannot logically be attributed to the Framers, the plaintiffs contend that inclusion of illegal aliens in fact defeats the purpose of apportionment; equal representation for equal numbers of "people of the United States." They request declaratory and injunctive relief, requiring the Census Bureau to use its "best efforts" to count illegal aliens separately and exclude them from the apportionment base.

The Bureau responds that it is constitutionally *required* to include *all* persons, including illegal aliens, in the apportionment base, insofar as an accurate count is reasonably possible. Furthermore, as a practical matter, it contends accurate methods to count illegal aliens do not presently exist, and would take months to develop, if it could be done at all. Intervenor New York State and amicus Mexican-American Legal Defense and Educational Fund argue that obtaining even a reasonably accurate count of the total population would be impossible if a simultaneous effort were made to count illegal aliens separately. The two goals are incompatible, according to the Bureau; any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. Obtaining the

cooperation of a suspicious and fearful population would be impossible if the group being counted perceived any possibility of the information being used against them. Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate. The Census Bureau's representations in this regard are supported by the amicus brief of the Mexican-American Fund, which has described for us the fears of persecution, particularly in Hispanic communities which it says would be exacerbated by the relief sought by the plaintiffs.

II. Standing as a Jurisdictional Principle

As a court of limited jurisdiction, our threshold inquiry must be to ensure that we are presented with a justiciable case, a "case or controversy" within the meaning of Article III. Part of the inquiry into whether a "case or controversy" exists must focus on whether any of the plaintiffs here have standing to present the issue discussed above. Standing is a complex issue, embodying both constitutional and prudential limitations on the exercise of the power of a federal court, but the initial question is whether the plaintiffs have established the indispensable constitutional minimum which must be present in every case, a concrete injury suffered personally by the party seeking relief. While the plaintiff need only allege "an identifiable trifle" of injury to overcome the constitutional barrier to invocation of the power of the courts, *United States* v. *SCRAP*, 412 U.S. 669 (1973), the Supreme Court has emphatically held that there is no such thing as "citizen standing" or "issue standing." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). Concern with or interest in an issue is simply not enough to entitle a litigant to demand resolution of a legal issue.

On the other hand, the mere fact that the injury is a small one, suffered generally by a large number of people,

poses no absolute *constitutional*[1] barrier to standing, so long as the plaintiff is able to establish that he or she personally has suffered the claimed injury. There is no doubt that individuals claiming that their votes are diluted because their Representative represents a greater number of constituents than do other Representatives in the same assembly have standing to challenge the apportionment scheme. *Baker* v. *Carr*, 369 U.S. 186 (1962). In such a case, the question is "whether the claims of malapportionment . . . are in fact made by plaintiffs whose representation would be improved if those claims were to prevail." *Ripon Society* v. *Nat'l Rep. Party*, 525 F.2d 567, 572 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976). As expressed by the court in *Baker* v. *Carr*, assuming that the plaintiffs' allegations assert a legally cognizable injury, it is enough for standing purposes that the plaintiffs "are among those who have sustained it." 369 U.S. at 208.

In numerous cases in the Supreme Court deciding issues of standing, the same fundamental proposition is emphasized. A party who is unable to demonstrate that an interest of his or her own is at stake always lacks standing. We find that principle dispositive of this case, as shown in the following discussion.

---

[1] The prudential limitations on standing may bar the hearing of such cases, but we need not consider them here. The constitutional requirement of injury in fact, suffered by the plaintiff, is dispositive.

The failure of a plaintiff to establish injury in fact can arise in a number of different contexts. For example, the plaintiff may have failed to show that the action under attack has caused or will cause any actual harm at all, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (challenge to members of Congress holding Armed Forces Reserves' commissions during their term of office); or, assuming that a substantial, cognizable injury has been shown, the plaintiff may have failed to show that he or she is among those who have sustained it. Warth v. Seldin, 422 U.S. 490 (1975). Our discussion will focus primarily on the latter.

III. The Standing of These Plaintiffs

In this case, the plaintiffs are the Federation for American Immigration Reform, the Committee for Representative Government (groups concerned with the alleged problems posed by our illegal alien population) and a group of legislators, some representing states with allegedly small illegal alien populations and others representing states with large illegal alien populations but areas thereof with small populations of unlawful residents. The allegations of injury are based on the plaintiffs' status as voters and lawful residents; no separate injury is alleged to be a result of some plaintiffs' status as Members of Congress. Furthermore, while the organizational plaintiffs allege standing "on their own behalf," no particular injury to them as organizations is alleged, and it is clear that they in fact appear solely as representatives of their members.[8] The plaintiffs' allegations as to standing are essentially that some one or more of them will likely suffer the loss of at least one national or state representative, and receive proportionately fewer federal benefits if the census proceeds as planned than if illegal aliens were counted and then eliminated from the apportionment base.

---

[8] The plaintiffs do assert that somehow counting illegal aliens in the census figures will "intensify and augment the movement to and residence in the United States of such persons," harming the plaintiffs' interest in the "just and full enforcement of [immigration] laws and in efforts to conform laws and policies governing immigration to modern-day demographic, economic and resource realities." Assuming that this would occur (and the plaintiffs offer us no explanation of the causal relationship involved) it is an example of the sort of "abstract interest" in a problem which the Supreme Court has made clear is insufficient to form a basis for standing. Sierra Club v. Morton, 405 U.S. 727 (1972). We assume, however, for purposes of this opinion, that if some of FAIR's members had standing, FAIR itself would be able to sue on their behalf as an organizational representative. *But cf.* Ripon Society v. Nat'l Rep. Party, 525 F.2d 567, 573-74 (D.C. Cir. 1975) (en banc).

For purposes of our standing analysis, we must assume, as plaintiffs allege, that the census method and resulting apportionment is indeed unconstitutional in that illegal aliens should be separately counted and excluded from the apportionment base. We also must accept as true the plaintiffs' estimate that the contemplated method will result in the misallocation of from one to sixteen seats in Congress. Furthermore, it is undisputed that many states will use those same figures for their own internal apportionment, and that Congress will distribute some federal monies according to the total population as counted by the Census Bureau.[9]

Given all these assumptions, the plaintiffs' showing as to standing is inadequate on a number of fronts. They have failed to demonstrate concrete harm which will occur and be suffered by any one of them, and they have also failed to demonstrate that the relief they request will benefit

---

[9] We will discuss this final issue only briefly. While Congress may well be distributing federal monies on the basis of undifferentiated population figures, that is its choice. The plaintiffs' allegation that it is irrational to distribute funds to states and localities on the basis of total population including illegal aliens and that they are being unlawfully discriminated against as a result of that choice lacks merit. Congress may choose any method of allocation it prefers, subject only to the constraints of the "rational relationship" test. Ohio Bd. of Empl. Services v. Hodory, 431 U.S. 471 (1977). The plaintiffs' argument seems ultimately to be that if Congress knew how many illegal aliens there were, it might choose to do things differently. That is up to Congress, not us; the means for requesting a calculation of the number of illegal aliens or excluding them from the basis for allocation of funds in specific statutory contexts are at its disposal, while we may order such a count only if it is statutorily or constitutionally required. In any case, we will not consider such a blunderbuss attack on the method Congress has chosen to distribute federal funds. Each statute serves different purposes, and if a plaintiff able to establish standing alleges in the context of a particular statute and its purposes that the choice made is irrational, we might have a case in a proper posture for consideration by a court. This is certainly not that case.

them personally. Indeed, it is impossible for them to do so, because of the way our method of apportionment operates. While the plaintiffs estimate that between one and sixteen congressional seats will be affected depending on the inclusion of illegal aliens, they can do no more than speculate as to which states might gain and which might lose representation. It may be Ohio which will gain; but on the other hand, it may be Alabama. Depending on how many illegal aliens there are, where they live, how accurate the census count is, and the interplay of all the other population factors which affect apportionment,[10] any of a number of states might benefit by the relief requested by the plaintiffs; the only effect which seems inevitable is that California would lose seats, though again, how many is a matter of speculation. Therefore, *none* of the plaintiffs are able to allege that the weight of his or her vote in the next decade *will be affected* by the expected method of taking the census and apportioning congressional seats. Indeed the plaintiffs expressly concedes this point; they point out for us that "prior to the conduct of the 1980

---

[10] As we have pointed out, *supra* note 5, undercounting is a serious problem for the Census Bureau, while at the same time, small shifts in population can make a significant difference in apportionment, especially at the state level. For instance, though each Representative in Congress represents roughly half a million people, because of the use of the "method of equal proportions," by the time the last few congressional seats are allocated very small differences in population become decisive. The present 435th seat in Congress was awarded to Oklahoma rather than Oregon. If Oregon had had 250 more persons in its apportionment population, it would have been the other way around. Tarrance Aff., ¶ 20. Thus, very small movements of persons from one place to another can be important, utlimately as important as large settlements of aliens in New York City or Los Angeles. The effects which counting illegal aliens may have on apportionment are therefore not straightforward and numerical, but are diffused and may be negated entirely by other population movements, such as the settlement of retirees in Florida, or of young professionals in Atlanta and Phoenix.

census and any intrastate reapportionment taken on the basis of tabulations, it is, of course, not possible to define precisely the parameters of the variances to result." Plaintiffs' Points & Authorities in Support of Preliminary Inj., at 22.[11]

The points is that plaintiffs' allegations are far too speculative to permit us to conclude that any *particular* plaintiff has an interest at stake in this proceeding and would benefit from the relief requested. It is not sufficient to allege that a plaintiff is one of a group, some of whom are likely to be injured. The fact that these plaintiffs share characteristics common to persons likely to be harmed is an insufficient basis for a conclusion that plaintiffs *themselves* will be harmed or their rights violated. They "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they

---

[11] With regard to the alleged harm suffered as a result of local use of the census data for internal apportionment of state and local representatives, the case for finding standing in any one of the plaintiffs is not much stronger. However, in spite of the inadequate data, it seems likely that, for instance, Springfield, Illinois will be at a disadvantage in comparison to Chicago if Illinois uses census data for apportionment purposes. This issue need not detain us, however. So long as they meet the demands of the fourteenth amendment, the individual states have considerable flexibility in deciding how to set up their internal government, including reapportioning electoral districts. Burns v. Richardson, 384 U.S. 73 (1966). While many of them use census data to do so, all of them need not and do not. For example, Hawaii's use of registered voters as an apportionment base was upheld in *Burns*. Moreover, the defendants have no constitutional duty to supply the states information in any particular form and these defendants certainly do not have the power or authority to dictate to the states how they should apportion themselves. To the extent that use of census data for intrastate districting violates the law of any particular state as it has been alleged it does in California, or offends the dictates of the fourteenth amendment, the remedy is clearly not in this court against these federal defendants.

purport to represent." *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975).

Despite diligent search, we have been unable to find a single case in which standing was granted to a plaintiff because *some* harm was likely to occur and it *might* affect the litigant personally, and we have been referred to no such case. Indeed, in similar cases, the very problem with which we are faced here has been consistently identified as fatal to federal jurisdiction.

In *Warth* v. *Seldin*, for instance, one group of plaintiffs were low-income persons who sought to challenge the alleged exclusionary zoning practiced by Penfield, New York. Even assuming that the plaintiffs had alleged a constitutional violation by the defendants and that if the Court granted relief more housing would be available to low-income persons, the Court nevertheless concluded that the plaintiffs could not rest a claim to standing simply on the fact that they were members of that group:

> But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class."

422 U.S. at 502.

Similarly, in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), a group of black plaintiffs brought suit against certain pub-

lic officials in Cairo, Illinois, alleging a pattern and practice of discriminatory conduct in the administration of the criminal justice system. The Supreme Court concluded that none of the plaintiffs had standing, though they were members of a group, some of which were likely to suffer from the alleged conduct in the future. The Court pointed out that granting standing to any particular plaintiff would rest the requirement of a personal, concrete injury on the possibility that that plaintiff in the future violate the criminal law and be tried for his or her offense, in which event the plaintiff may appear before the defendants, and the defendants may then continue their discriminatory conduct to the plaintiff's detriment. Granting standing in such a case would, for all practical purposes, eliminate the requirement of injury in fact.

We conclude that granting standing in this case would involve resting the requirement of injury in fact on speculation and conjecture. For instance, most of the individual named plaintiffs are residents of Pennsylvania. In order to conclude that they have been standing, we would have to assume that the Census Bureau will in fact be fairly successful in its efforts to include aliens in the census count, that the mathematical application of the method of equal proportions to the population figures will be affected by the inclusion of these figures, and that Pennsylvania will be among those states which will benefit. Interestingly enough, the plaintiffs have submitted charts showing their estimation of the effects on congressional apportionment given a variety of different possible assumptions about the illegal alien population. Among the charts which assume that the present census figures *include* illegal aliens, Pennsylvania is only affected if there are in fact *eight million* illegal aliens in the country, a figure at the upper limits of available estimates. Furthermore, according to the plaintiffs' own calculations, the interests of the Representative from Vermont are not affected at all, no matter what the various assumptions about the size and the distribution of

the illegal alien population. This demonstration could be repeated for each of the named plaintiffs and each of FAIR's members; while we may assume, and indeed be convinced that there will be *some* effect on apportionment by the inclusion of illegal aliens in the population base, the plaintiffs have failed to demonstrate with requisite specificity where that effect will fall, so that we would be able to find a "concrete injury" to some particular resident of some particular state.

We are further bolstered in our conclusion by other cases dealing specifically with the census, in which standing was also denied. For example, in a case much like this one, the Second Circuit concluded that the plaintiff lacked standing. *Sharrow* v. *Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968 (1972). Sharrow, a New York resident, sought to enjoin the failure of the Census Bureau to count and deduct the number of disenfranchised voters from the apportionment base, an explicit command of the fourteenth amendment. According to the plaintiff, the provision was adopted to deter the practice of some states of effectively eliminating the right of black citizens to vote through the use of various tests and taxes. By deducting all such disenfranchised citizens from the population figures, offending states would suffer the loss of congressional seats. However, apparently no effort has ever been made to actually conduct the census and apportionment in conformity with the fourteenth amendment.

The plaintiff alleged that as a resident of a state which did not attempt to limit the franchise, he would likely benefit from the relief sought because New York might receive one of the seats lost by the offending states. While the court agreed that if the plaintiff had established that this would in fact occur, he would have standing, it concluded that the plaintiff had failed to make an adequate showing that New York's delegation would be affected. The court

acknowledged that standing would be virtually impossible to establish in a challenge to nationwide apportionment:

> For instance, to establish standing in the present case, Sharrow would have to show, at least approximately, the apportionment his interpretation of [section 2 of the fourteenth amendment] would yield, not only for New York but for every other State as well. This would necessitate a state-by-state study of the disenfranchisement of adult males, a task of great porportions. And even after approximate nation-wide reapportionment figures were derived, it might well be that, because of population shifts, or because New York itself disenfranchised a portion of its adult males, New York's representation would not be increased as Sharrow claims.
>
> . . . .
>
> [The plaintiff's] sincere effort, an effort which we respect, to rectify what he considers a grave constitutional mistake is not enough. He must establish that the failure to enforce [section 2 of the fourteenth amendment] has resulted in a detriment to his rights of representation in Congress and this he has failed to do.

Id. at 97. *Accord, Lampkin* v. *Connor,* 239 F. Supp. 757 (D.D.C. 1965), *aff'd on other grounds,* 360 F.2d 505 (D.C. Cir. 1966). Similarly, in *Daughtrey* v. *Carter,* 584 F.2d 1050 (D.C. Cir. 1978), the plaintiffs sought review of the presidential pardon of those who had left the country to avoid the draft. They alleged that the unlawful restoration of these persons' citizenship rights, and their ensuing votes, would dilute the weight of the plaintiffs' lawfully-cast ballots. The court of appeals affirmed the dismissal of the complaint because the plaintiffs had not alleged a personal injury:

> They do not contend that their votes are diluted in any particular election or in any particular geographical

> area, nor do they contend that they are an identifiable group of voters whose votes are disfavored *vis-a-vis* those of some other group. At best the complaint alleges that as qualified voters of political subdivisions anywhere in the United States, appellants' votes in elections for any office, whether national, State, or local, are being diluted as a result of the reentry into the United States of an admittedly unknown, relatively small number of persons who allegedly should be excluded, and who therefore should not be entitled to vote.

Id. at 1056 (footnotes omitted).

Such cases are a far cry from the case relied on most heavily by the plaintiffs to support their claim for standing, *Baker* v. *Carr*, 369 U.S. 186 (1962). *Baker* was a challenge to the internal apportionment of Tennessee, the plaintiffs alleging that the drawing of district lines was so little tied to population that "a single vote in Moore County, Tennessee, [was] worth 19 votes in Hamilton County, [and] that one vote in Stuart or in Chester County [was] worth nearly eight times a single vote in Shelby or Knox County." 369 U.S. at 245 (Douglas, J., concurring). The plaintiffs, as residents and voters in these more heavily populated and thus disadvantaged counties, sought relief "to protect or vindicate an interest of their own," and were "voters who allege facts showing disadvantage to themselves as individuals," a showing which was sufficient for the purposes of standing. While that case clearly established that even a very small "concrete injury," amounting to a slight dilution of the weight of a single vote, is sufficient to support standing, the case equally clearly required that the plaintiffs show that they will be among those who have sustained the injury. In fact, the decision reemphasized the established rule that a plaintiff must be able to allege a personal stake in the outcome of the case. This the plaintiffs in this case have failed to do.

Another elementary component to standing is lacking here. The plaintiffs have failed to demonstrate that the relief they seek will redress the injury they assert. There must be "a substantial likelihood that the exercise of the court's remedial powers would redress the claimed injuries." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, No. 79-1123 (D.C. Cir. Feb. 8, 1980). Plaintiffs seek an order requiring identification of the illegal aliens in residence and exclusion of them from the apportionment population, alleging that only in this way will an unconstitutional dilution of their right to vote be avoided. While they would leave the actual method of counting illegal aliens up to the Bureau's expertise, one way they have proposed to do so is to estimate the total number of aliens, based on a citizenship question in the census questionnaire, and then calculate the number of illegal aliens by comparison of that total with data from the Immigration and Naturalization Service of the number of aliens lawfully present in the country.

The problem is that the defendants have made a convincing showing that neither Census Bureau nor INS figures are accurate enough to permit such a calculation with any reasonable degree of accuracy. The Census Bureau has conceded that it has had a serious problem in obtaining accurate counts of minority populations. Indeed, use of plaintiffs' proposed method of calculation based on data from the 1970 Census results in a total illegal alien count of *minus* 623,000.[12] While the Bureau has devoted large

---

[12] By focusing on this single problem, we do not intend to downplay or ignore the other problems the defendants have raised with ordering the relief sought by the plaintiffs. For example, the very concept of "illegal alien" amounts only to a vague notion of a person who might be deported if his or her presence were known to the authorities. But the determination of that legal fact can be a complicated process, as our numerous cases involving attempts by the INS to deport residents of this country demonstrate. The Immigration and Nationality Act is long and complex, full of

amounts of research and resources to improving this performance, at this point its potential success is entirely speculative. It may well be, in spite of the Bureau's best efforts, that minority groups in general will continue to be undercounted to the point that inclusion of illegal aliens in the apportionment base is more a matter of theory than practice. In that event, this court will have decided a constitutional issue, ordered the expenditure of millions of dollars and caused substantial delay in the taking of the census, all with absolutely no effect on the plaintiffs' voting rights. Our jurisdiction may not rest on so ephemeral a possibility of relief.

Since we must assume—again for purposes of standing—that plaintiffs have in fact identified a constitutional error in our national apportionment, we are concerned by the possible objection that if these plaintiffs, at this time, cannot object to the Census Bureau's plans, no one will be able to raise the issue because the necessary data to establish standing will never be gathered. While that possibility is a matter of considerable apprehension to us, we have nevertheless been firmly admonished by the Supreme Court that it makes no difference to the fact that we lack jurisdiction that the case may never be decided if these plaintiffs lack standing. The plaintiff in *United States* v. *Richardson*, 418 U.S. 166 (1974) brought a constitutional challenge to the failure of the CIA to make a "regular Statement and Account" of its expenditures available to the public. The Supreme Court rejected standing based on the plaintiff's status as a citizen and taxpayer, noting that its

---

provisos and exceptions. It would be absurd to expect the Census Bureau to develop figures, accurate enough to be used for the constitutional purpose of apportionment, of the number of deportable aliens present in this country, and even more absurd to ask for those figures on a block-by-block basis, as is necessary for intrastate districting.

decision likely meant that the issue would never be resolved.

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

Id. at 181.

We cannot ignore this directive, but in any case, it does not seem to us that this particular issue is forever shielded from exploration. While performing the calculations which would be necessary to show a substantial likelihood that a particular voter from a particular state would benefit

from the relief here sought is indeed a formidable task, it is by no means clear that it will be impossible once the census returns are complete. At that time, it might be possible to show that there is a substantial likelihood that a particular state, and thus a particular plaintiff, has suffered the requisite "concrete injury" required by article III, in that the procedures used have resulted in the loss of one or more congressional seats.[13] If a plaintiff should prevail in a constitutional challenge at that point, we do not believe the courts would be unable to grant effective relief.

Furthermore, there is no assurance that the necessary data will never be gathered by the Census Bureau, though it does not plan to do so now. Congress may request figures on illegal aliens at any time, and the Bureau would then be obliged to use its best efforts to develop accurate figures.[14] We note that the individual plaintiffs who include members of Congress are not without political power and legislative authority; a large number of states and congressional districts are potentially adversely affected by the inclusion of illegal aliens in the apportionment basis. The individual legislators thus have a ready-made forum in which to express their views and seek resolution of the issues involved in this suit.

---

[13] We also note that the same litigant who sought review in Sharrow v. Brown, discussed above, had earlier raised a challenge to the Census Bureau's failure to count disenfranchised citizens, and had obtained standing by refusing to complete his census form, raising his constitutional challenge as a defense to the subsequent prosecution. (He lost on the merits.) U.S. v. Sharrow, 309 F.2d 77 (2d Cir. 1962), *cert. denied*, 372 U.S. 949 (1963).

[14] We need not decide whether Congress could, consistent with the fifth amendment, require the Census Bureau to directly ascertain the resident status of individual aliens under threat of punishment should answers be refused. Brief of State of New York at 4.

IV. The Case for Equitable Relief

In light of the shortness of time remaining before the census is underway, and mindful of the fact that the plaintiffs may wish to seek review of our decision, we believe that it would not be imprudent for us also to indicate that we believe the plaintiffs have failed to establish their entitlement to equitable relief at this time. *Cf., O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (after finding no standing, Court went on to find no basis for equitable relief). The defendants have made a convincing showing that forcing it to attempt a separate head count of illegal aliens would be extremely expensive, delay the census by as much as a year, and likely be ineffective in any case. Furthermore, in a recent affidavit filed with this court, the plaintiffs themselves eliminate any possibility of this court's granting injunctive relief at this time. In the Supplemental Affidavit of V. Lance Tarrance, plaintiffs' expert, filed with the plaintiffs' motion for summary judgment, Mr. Tarrance attempts to answer the defendants' objections as to cost and delay:

> [S]everal alternatives avoiding these difficulties suggest themselves. Perhaps the most basic is *reliance only on the citizenship data generated by the questions already appearing on the long form.* These forms will be sent to more than 17 million households nationwide, and, if the practice in 1970 is followed, they will be distributed on a uniform basis throughout the country. These responses will provide data from which the Bureau could, for each census tract, statistically generate an estimate of the number of persons who were born outside the U.S. and are not naturalized citizens, *i.e.*, aliens. Comparing this figure with INS geographic data on legal aliens would then result in a figure on the number of illegal aliens in that census tract. This would involve no reprinting, disassembly of packages, staff retraining or any other of the preparatory steps said to cost $150 million and delay the census for up to a year.

(emphasis added). It thus appears that the plaintiffs would be satisfied with *no change at all* in the proposed census, so long as an estimate of the number of illegal aliens in each census tract is prepared and subtracted from the population base before the apportionment of congressional seats. This effectively eliminates any basis for equitable relief at this time.

Furthermore, at least in the abstract, plaintiff's case appears to be very weak on the merits. The language of the Constitution is not ambiguous. It requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons." By making express provision for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all-inclusive. According to James Madison, the apportionment was to be "founded on the aggregate number of inhabitants" of each state. *The Federalist*, No. 54, at 369 (J. Cooke ed. 1961). The Framers must have been aware that this choice of words would include women, children, bound servants, convicts, the insane—and aliens, since the same article of the Constitution grants Congress the power "to establish a uniform rule of naturalization." Art. I, section 8, cl. 4. We see little on which to base a conclusion that *illegal* aliens should now be excluded, simply because persons with their legal status were not an element of our population at the time our Constitution was written.

The defendants' interpretation of the constitutional language is bolstered by two centuries of consistent interpretation. The Census Bureau has always attempted to count every person residing in a state on census day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders. The issue of the inclusion of aliens in the apportionment base has received explicit congressional attention, both at the time of the adoption of

the fourteenth amendment and more recently. *See, e.g., Cong. Globe,* 39th Cong., 1st Sess. 359 (1866) (remarks of Rep. Conkling). Although the language "the whole number of persons" finally adopted in the fourteenth amendment is identical to the original choice of words in Article I, section 2, other options were considered and expressly rejected, after considerable debate, including the options of "voters" or "citizens." While, as a political matter, the reason seems to have been that any change would have diluted the power of the New England States which had a large number of women and aliens ineligible to vote, *see* Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and The Understanding of The Thirty-Ninth Congress,* 1965 S.Ct. Rev. 33 (1965), it was also pointed out during debate that the "non-voting classes" have a vital interest in the conduct of the Government. *Cong. Globe,* 39th Cong., 1st Sess. 141 (1866) (remarks of Rep. Blaine). In any case, it appears indisputable that Congress was aware of the all-inclusive scope of the language it was adopting.

During the first half of this century, a variety of proposals were made to exclude aliens from the apportionment base, and it appears to have been generally accepted that such a result would require a constitutional amendment.[15] See, for example, the 1929 advice from the legislative counsel for the Senate, concluding that statutory exclusion of aliens from the apportionment base would be unconstitutional. 71 Cong. Rec. 1821 (1929). In 1940, in the course of debate of the same issue, the subject of *illegal* aliens was raised. Asked whether "aliens who are in this country in violation of law have the right to be counted and represented," Representative Celler of New York responded:

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said

---

[15] *See, e.g.,* H.J. Res. 20, 71st Cong., 1st Sess. (1929); H.J. Res. 97, 72d Cong., 1st Sess. (1932).

> that all should be counted. We count the convicts who are just as dangerous and just as bad as the Communists or as the Nazis, as those aliens here illegally, and I would not come here and have the temerity to say that the convicts shall be excluded, if the founding fathers say they shall be included. The only way we can exclude them would be to pass a constitutional amendment.

86 Cong. Rec. 4372 (1940). The proposal to exclude aliens from the population base was rejected.

Furthermore, the plaintiffs' basic premise that the principle of "one person, one vote" is being violated by the inclusion of illegal aliens in the apportionment base is conclusory. They argue that their votes are "worth less' than the votes of citizens of states with large illegal alien populations, but that argument assumes the conclusion that illegal aliens should not be counted, the very question which the plaintiffs seek to have us decide.

In any case, the "one person, one vote" rule, announced and developed in the context of challenges to a state's internal districting, has little to offer us here. While the same underlying principle, equal representation for equal numbers of people, applies to both national apportionment and intrastate districting, the mathematical notion of one person, one vote has no applicability to the national issue.[16] "Equal representation" is only a rough goal in national apportionment, since every state must have at least one

---

[16] We also note that the phrase itself is inaccurate shorthand for the concept of equal representation for equal numbers of people, insofar as it is possible. State districts drawn strictly on the basis of population would clearly be constitutional, Reynolds v. Sims, 377 U.S. 533, 567 (1964), in spite of the fact that concentrations of non-voting residents in a few districts (such as where prisons or orphanages are located) would make the ballots of voters in those districts more "valuable" than voters' ballots in other districts.

representative, state lines must be respected in allocating congressional seats, and each state has the right to establish its own voting requirements, within constitutional limits.

Finally, we note that plaintiffs' complaint was filed only a few short months before the statutorily required date of the census, when any changes would inevitably result in disruption of the process, delay and expense. Three years ago, Congress was advised of the subjects to be covered, and two years ago it was provided the specific questions which would be asked. There would be no justification for our exercise of equitable powers to respond to plaintiffs eleventh hour challenge to those subjects and questions.

Given these considerations, even if the plaintiffs were able to establish standing to bring this lawsuit, we would be inclined to deny them the relief they seek. Both the equities of the situation and the merits of the case favor the defendants.

V. The Propriety of a Three-Judge Court

This three-judge court was convened pursuant to recently amended 28 U.S.C. 2284 (1976), which now prescribes such courts only "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." In light of our deliberations and after hearing further argument on the propriety of such a designation, we have concluded that the issue is most likely one for a single district judge. This case does not seem to us to involve an action "challenging the constitutionality of the apportionment of congressional *districts*." *Id.* (emphasis added). Nor did the drafters appear to have intended to cover cases such as this which do not directly affect state reapportionment. See *S. Rep. No.* 93-206, 93rd Cong., 1st Sess. 13 (1973) (revision intended to apply to actions

"challenging the constitutionality of any *statute* apportioning congressional districts" (emphasis added)). Here the challenge is to census practices which will produce data on which the apportionment of House of Representative members to states will be based, not to any state action reapportioning congressional districts. *Cf. Wesberry* v. *Sanders,* 376 U.S. 1 (1964). Somewhat similar challenges in the past to census practices potentially affecting allocations of House members to states have been decided by single judge courts. *See, e.g., Lampkin* v. *Connor,* 239 F. Supp. 757 (D.D.C. 1965), *aff'd on other grounds,* 360 F.2d 505 (D.C. Cir. 1966); *Sharrow* v. *Brown,* 319 F. Supp. 1012 (S.D.N.Y. 1970), *aff'd,* 447 F.2d 94 (2d Cir. 1971); *Borough Bethel Park* v. *Stans,* 319 F. Supp. 971 (W.D. Pa. 1970), *aff'd* 449 F.2d 575 (3d Cir. 1971).

Although we conclude that a three-judge court is not necessary and the issue may properly be decided by a single judge, we are concerned, in view of the imminence of the census which is scheduled to begin within a few weeks, that the case be promptly decided and the parties have time to take an appeal. Hence we have adopted a procedure which has been previously approved by the Supreme Court, *see Swift & Co.* v. *Wickham,* 382 U.S. 111, 114 n.4 (1965); *Query* v. *United States,* 316 U.S. 486, 488 (1942); and cited with approval in our own jurisdiction; *Krebs* v. *Ashbrook,* 275 F. Supp. 111, 119 (1967) (3-judge court, Bazelon, C.J., Fahy, J. & Corcoran, D.J.), *aff'd,* 407 F.2d 306 (1968), *cert. denied,* 393 U.S. 1026 (1969); *cf. Jackson* v. *Choate,* 404 F.2d 910 (5th Cir. 1968). We have reached a unanimous decision disposing of the case on grounds of lack of standing; District Judge Gasch additionally certifies that he individually arrived at the same conclusion that we collectively reached. This is done "out of abundant caution," *Swift & Co.* v. *Wickham,* 230 F. Supp. 398, 410 (S.D.N.Y. 1964), so that in the event we are mistaken, an appeal can still be expeditiously taken in the appropriate forum. *See, Krebs* v. *Ashbrook,* 275 F. Supp. at 119; *Swift & Co.,* at 410.

VI. Conclusion

Since we conclude that the plaintiffs lack standing, and that in any case they have failed to demonstrate that they are entitled to the exercise of our equitable powers, defendants' motion for summary judgment is granted and plaintiffs' motions for preliminary injunction and for summary judgment are denied.

/s/ Patricia M. Wald
Patricia M. Wald
United States Circuit Judge

/s/ Oliver Gasch
Oliver Gasch
United States District Judge

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

February 26, 1980

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Art. I, § 2, cl. 1:

The House of Representatives shall be composed of Members chosen every second year by the People of the several States . . . .

U.S. Const., Art. I, § 2, cl. 3:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const., Amend. 14, § 1:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. 14, § 2:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

28 U.S.C. § 2284(a):

A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

Cal. Welf. & Inst. Code § 11104 (West):

Any alien who is otherwise qualified for aid shall be eligible to receive public assistance if he certifies under penalty of perjury that to the best of his knowledge he is in the country legally and is entitled to remain indefinitely, or if he certifies that he is not under order for deportation, or if he certifies that he is married to an individual not under order for deportation.

N.Y. Soc. Serv. Law § 131-k (McKinney 1979-80 Supp.):

1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance.

2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall be immediately referred to the United States immigration and naturalization service, or the nearest consulate of the country of the applicant or the recipients for such service or consulate to take appropriate action or furnish assistance.

No. 80-975

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERATION FOR AMERICAN IMMIGRATION REFORM, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

WILLIAM KANTER
DOUGLAS N. LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-975

FEDERATION FOR AMERICAN IMMIGRATION REFORM, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioners lack standing to contest the inclusion of "illegal aliens" in the 1980 decennial census count.

2. Whether the constitutional provision that Representatives shall be apportioned among the states based on "the whole number of persons in each State" requires the Census Bureau to identify and exclude "illegal aliens" from the census count.

3. Whether a challenge to the manner in which the decennial census is conducted must be heard by a three-judge district court pursuant to 28 U.S.C. 2284(a).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Constitutional and statutory provisions involved 1

Statement 2

Argument 6

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Baker v. *Carr*, 369 U.S. 186 7

Borough of Bethel Park v. *Stans*, 319 F. Supp. 971, aff'd, 449 F. 2d 575 13

Burns v. *Richardson*, 384 U.S. 73 11

Daughtrey v. *Carter*, 584 F. 2d 1050 7

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 ..... 4, 9

Gonzalez v. *Automatic Employees Credit Union*, 419 U.S. 90 12

Klutznick v. *Carey*, No. A-567 (Dec. 30, 1980) ... 2

Klutznick v. *Young*, No. A-533 (Dec. 24, 1980) .. 2

Lampkin v. *Connor*, 239 F. Supp. 575, aff'd on other grounds, 360 F. 2d 505 ..... 7, 13

Linda R.S. v. *Richard D.*, 410 U.S. 614 9

Mathews v. *Diaz*, 426 U.S. 67 ..... 9, 10

O'Shea v. *Littleton*, 414 U.S. 488 7

Quon v. *Stans*, 309 F. Supp. 604 13

PREVIOUS PAGE WAS BLANK

Page

Cases—Continued:

Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 ..... 7, 8

Sharrow v. *Brown*, 319 F. Supp. 1012, aff'd, 447 F. 2d 94, cert. denied, 405 U.S. 968 .... 7, 13

Sierra Club v. *Morton*, 405 U.S. 727 8

Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 ..... 9, 10

Swift & Co. v. *Wickham*, 328 U.S. 111 6

United States v. *Otherson*, Nos. 80-1202 & 80-1203 (9th Cir. Nov. 6, 1980) 11

Village of Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 9

Warth v. *Seldin*, 422 U.S. 490 ..... 7, 9

Wesberry v. *Sanders*, 376 U.S. 1 ..... 10, 11

Wong Wing v. *United States*, 163 U.S. 228 .. 10-11

Yick Wo v. *Hopkins*, 118 U.S. 356 11

Constitution and statutes:

United States Constitution:

Article I 5, 10

Section 2, Clause 3 ..... 1, 2, 10

Section 8, Clause 4 10

Article III 7

Fourteenth Amendment 5, 10, 11

Section 1 ..... 10, 11

Section 2 ..... 1, 2, 5, 10, 11

Page

Constitution and statutes—Continued:

Administrative Procedure Act, 5 U.S.C. 706(2) ... 3

Census Act, 13 U.S.C. 1 *et seq.* 3

13 U.S.C. 141(a) 1, 2

13 U.S.C. 141(b) 2

13 U.S.C. 141(f) 2

8 U.S.C. 1251-1258 9

28 U.S.C. 1253 6

28 U.S.C. 2284(a) 1, 3, 5, 6, 12

Miscellaneous:

The Census Undercount Problem: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations, 96th Cong., 1st Sess. (1979) 12

Cong. Globe, 39th Cong., 1st Sess. 9-10, 141, 359, 535, 2804 (1865-1966) 11

71 Cong. Rec. 1821-1822 (1929) 11

86 Cong. Rec. 4371-4372 (1940) 12

86 Cong. Rec. 4372 (1940) 11

Economic and Social Statistics for Spanish-Speaking Americans: Hearings on H.J. Res. 406 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service, 93d Cong., 2d Sess. (1974) 12

The Federalist No. 54 (J. Cooke ed. 1961) 10

Page

Miscellaneous—Continued:

Hearings on H.J. Res. 20, 101, 356, and 484 Before the House Comm. on the Judiciary, 71st Cong., 3d Sess. (Serial 16) (1931) 11-12

S. Rep. No. 93-206, 93d Cong., 1st Sess. (1973) 12

S. Rep. No. 94-204, 94th Cong., 1st Sess. (1975) 12

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 4a-31a) is reported at 486 F. Supp. 564.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on November 6, 1980. The petition for a writ of certiorari was filed on December 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3 of the Constitution provides in pertinent part:

> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Fourteenth Amendment, Section 2 of the Constitution provides in pertinent part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Section 141(a) of the Census Act, 13 U.S.C. 141(a), provides in pertinent part:

> The Secretary shall, in the year 1980 and every ten years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine * * *.

28 U.S.C. 2284(a) provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an

action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

STATEMENT

1. Article I, Section 2, Clause 3 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, mandates that the members of the House of Representatives "be apportioned among the several States * * * according to their respective Numbers, which shall be determined * * * every subsequent Term of ten Years, in such Manner as [Congress] shall by law direct." Pursuant to this authority, Congress directed the Secretary of Commerce (through the Bureau of the Census) to conduct a census of the population on April 1, 1980. See 13 U.S.C. 141(a). In accordance with prior practice, the Bureau has attempted to count all persons residing in each state, without regard to the lawfulness of their presence in this country. On December 31, 1980, following completion of the 1980 decennial census, the Secretary certified the state population totals to the President, as required by 13 U.S.C. 141(b). See *Klutznick* v. *Carey*, No. A-567 (Dec. 30, 1980); *Klutznick* v. *Young*, No. A-533 (Dec. 24, 1980) (Stewart, Circuit Justice).

More than two years prior to the commencement of the 1980 census, the Secretary submitted reports to Congress containing the Bureau's determination of the subjects proposed to be included, and the types of information to be compiled, in the census. See 13 U.S.C. 141(f). These submissions made clear that the Bureau intended to count every person residing in a state, including illegal aliens (Pet. App. 29a). Nonetheless, petitioners did not file this suit until December 5, 1979, less than four months prior to the com-

mencement of the 1980 census.[1] Petitioners sought declaratory and injunctive relief, claiming that, insofar as the Bureau proposed to count illegal as well as legal aliens, the 1980 census would violate the Constitution, the Census Act, 13 U.S.C. 1 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 706(2). Petitioners argued that the unlawful inclusion of illegal aliens in the census count would inflate the population of those urban areas and states that have high concentrations of illegal aliens. According to petitioners, the 1980 census would thus result in the malapportionment of an unknown number of congressional seats and also state legislatures that base their apportionment on the census. In addition, petitioners contended that those states and localities with relatively small populations of illegal aliens would lose an unknown amount of federal money, because numerous federal programs allocate funds according to the census figures. Petitioners requested that a three-judge court be convened to consider their claims. See 28 U.S.C. 2284(a).

2. a. Both sides moved for summary judgment, and on February 26, 1980, a three-judge district court granted the government's motion for summary judgment, dismissed petitioners' complaint, and dissolved the three-judge court. The court first concluded (Pet. App. 10a-24a) that petitioners lacked standing to challenge the manner in which the Bureau of Census proposed to conduct the 1980 census. The court found that, even assuming that illegal aliens should not be counted in the census, it is not possible, given the uncertainties of the general population shifts and the size and location of the illegal alien population, to ascertain which, if any, of the individual petitioners would suffer a loss in representation as a result of the census (*id.* at 14a).

---

[1]Petitioners are the Federation for American Immigration Reform, the Committee for Representative Government, and 26 current or former federal legislators.

Because none of the petitioners could "allege that the weight of his or her vote in the next decade [*would*] *be affected* by the expected method of taking the census and apportioning congressional seats" (*ibid.*; emphasis in original), petitioners failed to demonstrate a concrete injury in fact (*id.* at 14a-20a).[2]

The court held that petitioners lacked standing for still another reason. Citing *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 (1978), the court stated that petitioners had failed to show that "the relief they seek will redress the injury they assert" (Pet. App. 21a). The court pointed out that the Bureau has no reliable method of calculating the number of illegal aliens and that one of the methods proposed by petitioners, when applied to the 1970 census results, produced a total illegal alien population of *minus* 623,000 (*ibid.*). The court also noted that, in light of the complexity of the immigration laws, it was virtually impossible to define "illegal alien" for census purposes (*id.* at 21a-22a n.12). Moreover, the court recognized that because even the latest census techniques may result in the underreporting of lawful aliens and minority groups, the counting of illegal aliens might not in any event result in malapportionment (*id.* at 22a). The court concluded that (*ibid.*):

> In that event, this court will have decided a constitutional issue, ordered the expenditure of millions of dollars and caused substantial delay in the taking of the census, all with absolutely no effect on the [petitioners'] voting rights. Our jurisdiction may not rest on so ephemeral a possibility of relief.

---

[2]The court also stated (Pet. App. 13a n.9) that petitioners certainly had no standing to present a "blunderbuss attack" on Congress' decision to use the census (including illegal aliens) in allocating federal funds.

b. The district court also indicated (Pet. App. 25a-29a) that, even if they had standing, petitioners would not be entitled to equitable relief. The court concluded that the public interest in permitting the census to go forward substantially outweighed petitioners' "eleventh hour" claim of irreparable harm (*id.* at 29a). In addition, the court observed that "[petitioners'] case appears to be very weak on the merits" (*id.* at 26a). The court explained that the all-inclusive language[3] and the history of the Constitution show that illegal aliens are to be counted in the census. In particular, the court relied on the fact that the Congress that proposed the Fourteenth Amendment and subsequent Congresses have assumed that the census includes all aliens (*id.* at 26a-27a). The court also noted that for two hundred years the Bureau and its predecessors have attempted to count every resident, including illegal aliens and numerous other groups (such as women, convicts, and the insane), who at one time or another have been disfranchised or otherwise legally disabled (*id.* at 26a).

c. Finally, the district court decided that there was no basis for convening a three-judge district court and that petitioners' claim should have been considered by a single district judge. The court explained that 28 U.S.C. 2284(a) requires a three-judge district court only "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Looking to the language and legislative history of the statute, the court found that an action challenging census practices is not an apportionment

---

[3]Section 2 of the Fourteenth Amendment, which supplanted in part the apportionment provision of Article I, provides that the census shall include "the whole number of persons in each State."

case within the meaning of 28 U.S.C. 2284(a). See Pet. App. 29a-30a.[4] Accordingly, the court ordered the three-judge court dissolved.

3. Petitioners filed a direct appeal to this Court, alleging jurisdiction under 28 U.S.C. 1253, and also appealed to the court of appeals, which stayed its proceedings pending this Court's disposition of petitioners' direct appeal. On March 17, 1980, the Court denied petitioners' application for a stay of the census pending appeal (No. A-747), and on June 16, 1980, the Court dismissed petitioners' appeal (No. 79-1588). Subsequently, the court of appeals summarily affirmed the judgment of the district court (Pet. App. 1a).

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any court of appeals. Particularly in light of petitioners' failure to raise their challenge to the 1980 census until the eleventh hour and the fact that the census has now been completed and the results certified to Congress, further review of petitioners' speculative and novel claims is unwarranted.

1. Petitioners contend (Pet. 10-16) that they have standing to challenge the Census Bureau's determination to include all resident aliens in the 1980 decennial census. Even assuming that illegal aliens should be excluded from the census, however (but see pages 10-12, *infra*), the courts below correctly concluded that petitioners have failed to allege sufficient injury in fact to invoke the jurisdiction of the federal courts (Pet. App. 10a-20a, 1a). No petitioner has alleged that the exclusion of resident illegal aliens from the

---

[4]In order to expedite the litigation and out of an abundance of caution, Judge Gasch specifically certified that he agreed with the conclusions of the three-judge court. See *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114 n.4 (1965). Subsequently, on February 29, 1980, Judge Gasch denied petitioners' request for an injunction pending appeal.

decennial enumeration will necessarily or even likely affect the weight of his vote in the next decade. Rather, petitioners allege only that one or more lawful residents of this country might be disadvantaged with regard to the relative voting strength of other lawful residents within and among the various states. Such undifferentiated and speculative injuries fall far short of establishing injury in fact within the scope of Article III. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217-220 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-499 (1974); *Daughtrey* v. *Carter*, 584 F. 2d 1050, 1056-1057 (D.C. Cir. 1978) (no standing to challenge voting by illegal aliens); *Sharrow* v. *Brown*, 447 F. 2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972) (no standing to challenge census); *Lampkin* v. *Connor*, 239 F. Supp. 757, 760-763 (D.D.C. 1965) (no standing to challenge census), aff'd on other grounds, 360 F. 2d 505 (D.C. Cir. 1966).[5]

Petitioners suggest (Pet. 11-12) that it is inevitable that California would lose a seat in Congress if illegal aliens were excluded from the census and that therefore lawful residents outside of California, who include at least one petitioner or one of petitioner FAIR's members, would necessarily enjoy an increase in relative representation in Congress. At the outset, we note that the actual census results undermine the factual premise of petitioners' contention.[6] More

---

[5] *Baker* v. *Carr*, 369 U.S. 186 (1962), on which petitioners rely, is not to the contrary. In that case, the plaintiffs were residents of populous districts who could demonstrate with certainty that the state's unequal districting was actually diminishing their voting rights. Here, in contrast, no petitioner has alleged a quantifiable, non-speculative injury.

[6] The actual 1980 census results show that the Bureau counted approximately 226.5 million persons. The April 1, 1980, demographic estimate of national population, which does *not* include any estimate of the number of undocumented aliens residing in the country at that time,

important, even if California would lose a seat in Congress if illegal aliens were somehow excluded from the census count, petitioners cannot state which of their members would in fact gain relatively increased congressional representation. Nor can petitioners allege standing as a group merely by combining their speculative individual claims. See *Schlesinger* v. *Reservists Committee to Stop the War, supra,* 418 U.S. at 217-220; *Sierra Club* v. *Morton,* 405 U.S. 727, 738-740 (1972).[7]

Furthermore, as the courts below concluded (Pet. App. 21a-23a), petitioners also lack standing because they have failed to demonstrate that the allegedly improper inclusion of illegal aliens in the census is a redressable injury. In

---

is 226 million. Thus, the Bureau actually counted a relatively small number of unlawful aliens nationwide while reducing the undercount experienced in previous censuses, or it counted a larger but unknown number of illegal aliens while missing some lawful residents. In either event, it is highly speculative whether any theoretical statistical adjustment for a relatively small number of persons scattered throughout the country would cause California or any other state to lose a seat in Congress. At a minimum, no petitioner can allege with particularity that his voting strength will be increased if illegal aliens are discounted.

[7]We further note that regardless of whether illegal aliens are properly included in the census, voting representation among districts will vary greatly. Because congressional districts do not cross state lines, there is an inevitable and substantial disparity in size among congressional districts in different states. For example, under the 1970 census, South Dakota, which had a population of 666,257, had two representatives in Congress, whereas North Dakota, which had a population of 617,761, had only one representative. In addition, districts will differ as to the percentage of non-voting, lawful residents, such as the underaged, the prison population, and number of lawful aliens.

belatedly challenging the census, petitioners did not propose any statistically defensible method of estimating the number or location of unlawful aliens in the country. See *id.* at 8a n.6, 21a-22a. In fact, application of one of petitioners' proposed formulas to the 1970 census produced the absurd result that there were *minus* 623,000 illegal aliens in the country at that time. *Id.* at 21a. Nor would conducting a new census aid petitioners' cause. Determination of who is an illegal alien is a formidable task, involving application and interpretation of complex provisions of the immigration laws and often requiring a full evidentiary hearing. See 8 U.S.C. 1251-1258. Cf. *Mathews* v. *Diaz*, 426 U.S. 67, 79-80 n.13 (1976). Moreover, there is no reason to believe that a census form requesting that illegal aliens identify themselves as such would be accurately answered. On the other hand, any effort to identify "illegal" aliens would seriously hamper the Bureau's attempts to obtain an accurate count of certain lawful resident minority groups. In sum, there is no " 'substantial likelihood' that the relief requested will redress the injury claimed * * *." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). See also *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth* v. *Seldin, supra*, 422 U.S. at 504; *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973).[8]

---

[8]The lower courts correctly declined to consider petitioners' "blunderbuss" attack on the use of census results in the distribution of federal funds. See Pet. App. 13a n.9; Pet. 16-17. Congress may disburse such funds in any manner it chooses, so long as the method bears a rational relationship to the purpose of the statute. Thus, even if the Bureau should not have counted illegal aliens for apportionment purposes, it does not follow that Congress could not distribute educational funds, for example, on the basis of total population, including illegal aliens. In any event, petitioners are required to challenge the use of total population figures in the context of a particular program and do not have

2. Even if petitioners' untimely challenge to the census process sufficiently alleges standing, petitioners' claim (Pet. 7-10) that the Bureau improperly included illegal aliens in the enumeration process is without merit. Article I, Section 2, Clause 3 of the Constitution broadly provides that the census includes the "whole Number of free Persons" in each state, except for untaxed Indians and slaves.[9] Thus, as petitioners concede (Pet. 8), the literal language of the Constitution mandates that illegal aliens residing in each state be counted in the census. In addition, as the district court pointed out (Pet. App. 26a), the fact that the Framers specifically excepted two groups from the scope of the Census Clause strongly supports the conclusion that all other persons, including aliens, fall within the inclusive language of the provision. To be sure, there were no illegal aliens at the time the Constitution was written. But the Constitution itself authorized Congress to enact laws concerning immigration and naturalization (art. I, § 8, cl. 4), and the constitutional debates make clear that Congress was to be apportioned "by the number of the State's *inhabitants.*" *Wesberry* v. *Sanders*, 376 U.S. 1, 13 (1964) (emphasis supplied). See *The Federalist* No. 54, at 369 (J. Cooke ed. 1961).

Moreover, the history and language of the Fourteenth Amendment squarely refute petitioners' contentions. This Court has repeatedly concluded that an illegal alien is a "person" within the ambit of Section 1 of the Fourteenth Amendment (see, *e.g.*, *Mathews* v. *Diaz*, *supra*, 426 U.S. at 77; *Wong Wing* v. *United States*, 163 U.S. 228, 238

---

standing to challenge the census itself because one of them might be injured by Congress' improper reliance on total population figures in distributing certain federal funds. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*.

[9]Slaves were to be counted as three-fifths of a person. Of course, that portion of Article I was repealed by Section 2 of the Fourteenth Amendment.

(1896); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886)), and petitioners suggest no reason why an illegal alien should be considered a "person" for purposes of Section 1 of the Fourteenth Amendment but not for Section 2. See also *United States* v. *Otherson*, Nos. 80-1202 & 80-1203 (9th Cir. Nov. 6, 1980), slip op. 900-906.[10] To the contrary, the congressional debates show that Congress purposefully adopted the inclusive phrase "whole number of persons in each State" while specifically rejecting more restrictive alternatives such as "citizens" or "voters." See Cong. Globe, 39th Cong., 1st Sess. 9-10, 141, 359, 535, 2804 (1865-1866); Pet. App. 26a-27a. For example, Representative Conkling observed that the exclusion of aliens from the apportionment base would "cause considerable inequalities * * *, because the number of aliens in some States is very large." Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

Petitioners also ignore two hundred years of consistent administrative practice. The Bureau of the Census and its predecessors have always counted all inhabitants in the United States, regardless of whether they are mental incompetents, convicts, illegal aliens, or otherwise legally disabled persons. See Pet. App. 26a. Congress has repeatedly approved this settled methodology, particularly with regard to persons "in this country in violation of law." 86 Cong. Rec. 4372 (1940) (colloquy between Reps. Rankin and Celler). See, *e.g.*, 71 Cong. Rec. 1821-1822 (1929) (remarks of Sen. Vandenberg); *Hearings on H.J. Res. 20,*

---

[10] *Burns* v. *Richardson*, 384 U.S. 73 (1966), is not to the contrary. In *Burns*, the Court merely concluded that a *state* may apportion its legislature on the basis of registered voters so long as the resulting "distribution of legislators [is] not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93. The Court did not purport to address who must be counted in the *federal* census—a process that it had previously described as an effort to ascertain "the number of the State's *inhabitants*." *Wesberry* v. *Sanders*, *supra*, 376 U.S. at 13.

101, 356, and 484 Before the House Comm. on the Judiciary, 71st Cong., 3d Sess. (Serial 16) 27 (1931); 86 Cong. Rec. 4371-4372 (1940). In fact, Congress held extensive hearings regarding the 1980 census and was fully aware that the Bureau intended to count all persons, including all resident aliens, without inquiring into an alien's immigration status. See, *e.g.*, *Economic and Social Statistics for Spanish-Speaking Americans: Hearings on H.J. Res. 406 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service*, 93d Cong., 2d Sess. 23-25, 33, 35, 82-83 (1974); *The Census Undercount Problem: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 19, 23-25, 29-31 (1979).

3. Finally, petitioners renew their claim that this case was appropriately heard by a three-judge court pursuant to 28 U.S.C. 2284(a). In a case of first impression (Pet. 20), the courts below correctly concluded that petitioners' suit does not constitute "an action * * * challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. 2284(a). See Pet. App. 29a-30a, 1a. Petitioners do not challenge any actual apportionment; rather, they contest certain census practices that might affect the allocation of congressional seats among the states and, ultimately, the apportionment of congressional and state legislative districts. Such an indirect attack on future apportionment does not satisfy the narrow terms of Section 2284(a). See S. Rep. No. 94-204, 94th Cong., 1st Sess. 12 (1975); S. Rep. No. 93-206, 93d Cong., 1st Sess. 13 (1973). See also *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 97-98 (1974). Indeed, even prior to the amendment of the three-judge court provisions in 1976, which were designed

to limit the number of cases heard by such tribunals, challenges to census practices were routinely heard by single-judge district courts. See, *e.g.*, *Borough of Bethel Park* v. *Stans*, 319 F. Supp. 971 (W.D. Pa. 1970), aff'd, 449 F. 2d 575 (3d Cir. 1971); *Sharrow* v. *Brown*, 319 F. Supp. 1012 (S.D.N.Y. 1970), aff'd, 447 F. 2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972); *Quon* v. *Stans*, 309 F. Supp. 604 (N.D. Cal. 1970); *Lampkin* v. *Connor*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

WILLIAM KANTER
DOUGLAS N. LETTER
Attorneys

FEBRUARY 1981

DOJ-1981-02